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Diana Nelson Tanoja v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05 – 64 OF 2008(B)

B

ALAUDDIN PCA, HASHIM YUSOFF AND ABDULL HAMID EMBONG FCJJ

28 JANUARY 2010

C *Criminal Procedure — Statements — Cautioned statements — Admissibility of — Whether Filipino accused could understand and speak English — Statement held to be admissible after voir dire — Whether appellate court should interfere with finding made in voir dire*

D *Criminal Procedure — Trial — Miscarriage of justice — Grounds of judgment written before hearing of submissions — Whether trial judge prejudged issue — Whether submission at end of defence case discretionary — Whether trial judge could decide without hearing defence submission*

E *Criminal Procedure — Trial — Submissions — Whether submission at end of defence case discretionary — Whether trial judge could decide without hearing defence submission*

The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act
F 1952 ('the Act') for having trafficked in 508.6g of cocaine. At the end of the trial the appellant was convicted and sentenced to death by the High Court. His appeal to the Court of Appeal was dismissed and hence, the present appeal. The first ground of appeal was that the learned trial judge had prejudged the issue even before hearing submissions of learned counsel and
G the DPP. Counsel alleged that the grounds of 18 January 2005 was the date the appellant entered his defence. After the appellant had entered his defence and been cross-examined by the DPP the learned trial judge fixed 26 January 2005 for submission by parties. Both counsel and the DPP did make their submissions on 26 January 2005 and the learned trial judge handed down his
H decision immediately after that. The second ground related to the cautioned statement under s 37A(1) of the Act which according to the appellant's counsel should not be admissible as the appellant did not understand the caution administered. It was contended that the appellant did not give the statement voluntarily and his rights and consequences of giving the statement
I were not explained to him in his mother tongue ie Tagalog, and the appellant did not understand the caution administered to him in English.

Held, dismissing the appellant's appeal against conviction and sentence:

(1) The date 18 January 2005 was a typing error. Even assuming that it was

not a typing error and the learned trial judge had actually completed his judgment on the 18th, there was no reason why he could not give his decision on the 18th but instead gave his decision on the 26th. It is normal that a judge will write his judgment after he had handed down the decision ie in this case after 26 January 2005 (see paras 31–32).

(2) It is not mandatory for the learned trial judge to hear submission from learned counsel before giving his decision. The word 'may' in s 181(1) of the Criminal Procedure Code indicates a discretion. Submission at the end of the defence case is discretionary and not mandatory. The learned trial judge could if he wanted to, decide without having the need to hear submission from defence counsel. Submission is not evidence and hence the judgment is not defective. If the law categorically states that it is not mandatory for counsel to make submission, there is no reason why it is mandatory for the learned trial judge to hear submission. However, the notes of evidence showed that the learned trial judge did consider the submission of learned counsel. This fact lent credence to the date 18 January being a typographical error (see paras 35 & 37–38).

(3) It was obvious that the appellant had confirmed that he could understand and speak the English language fluently. In the cautioned statement, the appellant chose to speak in the English language when asked by the recording officer in which language he would like to speak. In the trial within a trial, when cross-examined, the appellant told the court that he spoke in 'broken English' when he was in Amsterdam. This suggested that the appellant could understand the English language (see paras 46 & 48–49).

(4) The purpose of having a trial within a trial is to determine if the alleged statement was made voluntarily with no possible inducement, threat or promise. Once a trial judge has come to a conclusion that the statement was made voluntarily, an appellate court should be slow in interfering with such finding unless it can be shown that such finding was flawed with a distinct material error of principle or the learned trial judge had clearly and wrongly evaluated the facts. The ruling on the admissibility of the cautioned statement by the learned trial judge was a correct one. There was no infirmity whatsoever in the concurrent findings of facts by the learned trial judge and the judges of the Court of Appeal which required appellate interference (see paras 51–52 & 55).

[Bahasa Malaysia summary

Perayu dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') atas kesalahan mengedar 508.6g kokain. Pada akhir perbicaraan, perayu disabitkan dan dihukum mati oleh Mahkamah Tinggi. Rayuannya ke Mahkamah Rayuan ditolak, justeru rayuan ini. Alasan rayuan yang pertama

ialah hakim bicara yang bijaksana telah menghakimi isunya terlebih dahulu sebelum mendengar hujahan peguam yang bijaksana dan TPR. Peguam mendakwa bahawa alasan-alasan pada 18 Januari 2005 merupakan tarikh perayu memasukkan pembelaannya. Setelah perayu memasukkan pembelaannya dan diperiksa balas oleh TPR, hakim bicara yang bijaksana menetapkan 26 Januari 2005 bagi hujahan kedua-dua pihak. Kedua-dua peguam dan TPR telah menyampaikan hujahan mereka pada 26 Januari 2005 dan hakim bicara yang bijaksana telah membacakan keputusannya sejurus selepas itu. Alasan kedua berkaitan pernyataan beramaran di bawah s 37A(1) Akta yang mana menurut peguam perayu tidak harus diterima disebabkan perayu tidak faham pernyataan yang dibacakan kepadanya. Dihujahkan bahawa perayu tidak memberikan pernyataan tersebut secara sukarela dan hak dan akibat daripada memberikan pernyataan itu tidak dijelaskan kepadanya dalam bahasa ibundanya, iaitu bahasa Tagalog, dan perayu tidak faham pernyataan yang dibacakan kepadanya dalam bahasa Inggeris.

Diputuskan, menolak rayuan perayu terhadap sabitan dan hukuman:

(1) Tarikh 18 Januari 2005 adalah kesilapan penaipan. Walaupun jika bukan kesilapan penaipan dan hakim bicara yang bijaksana telah menyempurnakan keputusannya pada 18hb, tiada sebab mengapa beliau tidak boleh memberikan keputusannya pada 18hb dan menyampaikan keputusannya pada 26hb. Adalah lazim seorang hakim menulis penghakimannya sesudah membacakan keputusan tersebut, iaitu dalam kes ini selepas 26 Januari 2005 (lihat perenggan 31–32).

(2) Tidak mandatori bagi hakim bicara yang bijaksana untuk mendengar hujahan peguam yang bijaksana sebelum memberikan keputusannya. Perkataan 'may' dalam s 181(1) Kanun Prosedur Jenayah menunjukkan kuasa budi bicara. Hujahan pada akhir kes pembelaan adalah atas budi bicara dan bukannya mandatori. Hakim bicara yang bijaksana boleh, jika beliau mahu, membuat keputusan tanpa mendengar hujahan peguam pembelaan. Hujahan bukanlah keterangan dan oleh itu penghakiman tidak cacat. Jika undang-undang menyatakan secara kategorinya bahawa bukan mandatori bagi peguam membuat hujahan, tiada sebab ia menjadi mandatori bagi hakim bicara yang bijaksana mendengar hujahan. Walau bagaimanapun, nota-nota keterangan menunjukkan bahawa hakim bicara yang bijaksana mempertimbangkan hujahan peguam yang bijaksana. Fakta ini membuktikan kebenaran bahawa tarikh 18 Januari itu adalah kesilapan penaipan (lihat perenggan 35 & 37–38).

(3) Adalah jelas perayu telah mengesahkan bahawa dia faham dan fasih berbahasa Inggeris. Dalam pernyataan beramarannya, perayu memilih untuk bercakap dalam bahasa Inggeris apabila ditanya oleh pegawai

pencatat bahasa pilihannya. Semasa perbicaraan dalam perbicaraan, apabila disoal balas, perayu menyatakan kepada mahkamah bahawa dia boleh bercakap 'broken English' semasa dia berada di Amsterdam. Ini menunjukkan bahawa perayu memahami bahasa Inggeris (lihat perenggan 46 & 48–49).

(4) Tujuan mengadakan perbicaraan dalam perbicaraan adalah untuk menentukan sama ada pernyataan yang didakwa itu dibuat secara sukarela tanpa kemungkinan dorongan, ugutan atau janji. Apabila seorang hakim bicara mencapai kesimpulan bahawa pernyataan tersebut dibuat secara sukarela, mahkamah rayuan harus berhati-hati untuk mencampuri keputusan tersebut kecuali jika boleh ditunjukkan bahawa keputusan itu cacat dengan kesilapan prinsip penting yang jelas atau hakim bicara yang bijaksana dengan jelas telah salah menilai fakta-fakta tersebut. Keputusan kebolehterimaan pernyataan beramaran oleh hakim bicara yang bijaksana adalah tepat. Tiada kelemahan dalam penemuan fakta-fakta sejajar oleh hakim bicara yang bijaksana dan hakim-hakim Mahkamah Rayuan yang memerlukan campur tangan mahkamah rayuan (lihat perenggan 51–52 & 55).]

Notes

For cases on cautioned statements, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4365–4372.

For cases on miscarriage of justice, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4857–4859.

For cases on trial generally, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4549–5094.

Cases referred to

PP v Munusamy [1980] 2 MLJ 133, FC (refd)

Legislation referred to

Criminal Procedure Code s 181(1)

Dangerous Drugs Act 1952 ss 37(d), (da)(ix), 37A(1), 39B

Appeal from: Criminal Appeal No B-05–20 of 2005 (Court of Appeal, Putrajaya)

Sreekant Pillai (Paul Fernandez with him) (Lim Sreekant & Co) for the appellant.

Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Alauddin PCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decisions of the High

Court and the Court of Appeal in finding the appellant guilty of the offence of trafficking in dangerous drugs contrary to s 39B of the Dangerous Drugs Act 1952 ('the Act').

[2] The charge reads as follows:

> Bahawa kamu pada 22.8.2002 lebih kurang jam 7.45 pagi, di tempat pungutan bagasi, Carasul D, Aras 3, MTB KLIA, di dalam daerah Sepang, di dalam Negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya jenis kokain seberat 508.6 gram. Oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Pindaan 1980) dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 (Pindaan 1980).

[3] At the end of the trial, the appellant was convicted and sentenced to death by the High Court.

[4] His appeal to the Court of Appeal was dismissed.

[5] Hence the present appeal to this honourable court.

FACTS OF THE CASE

[6] At about 7.45am on 22 August 2002, PW3 led a police team from the Narcotics Department, Level 3 KLIA to make observation of passengers, especially those arriving from Amsterdam, at the baggage collection area KLIA at Carousel 'D'.

[7] PW3 observed that the appellant was carrying a black briefcase ('exh P7') in his right hand and a paper bag in his left hand. He also observed that the appellant took from the baggage carousel 'D' a backpack ('exh P14').

[8] PW3 decided to detain the appellant for a random check. At the time PW3 detained him, the appellant was carrying the briefcase ('P7') in his right hand, a paper bag in his left hand and the backpack ('P14') on his shoulder. He also had with him a passport ('P26'), a customs declaration form ('P28') and an air ticket ('P27').

[9] PW3 then escorted the appellant to the Pejabat Narkotik, Aras 3 KLIA, with the appellant still carrying the briefcase, the paper bag and the backpack.

[10] Upon arrival at the Pejabat Narkotik, PW3 carried out an examination of the backpack, the paper bag and the briefcase in the presence of the appellant. The backpack was packed with clothings (exhs P14A, P14B, P14C, P14D, P14 and P14F).

[11] When the backpack and the paper bag were being examined the appellant appeared normal and composed. There was nothing incriminating found in the backpack and the paper bag. A

[12] Then PW3 proceeded to examine the briefcase ('P7'). Inside it, PW3 found some clothings like T-shirt, stockings and underwear (exhs P8, P9, P10, P11, P12 and P13). PW3 queried the appellant why these items were in the briefcase and not in the backpack. B

[13] The appellant did not give a logical answer and began to turn pale. This caused PW3 to be suspicious and he made a more thorough examination of the briefcase. He found stitches sewn untidily at the bottom of the briefcase. PW3 cut open the stitches. He then found two compartments on both sides of the briefcase into which had been packed whitish powdery and lumpy substances, suspected to be drugs. C D

[14] The exhibits were seized and a search list ('P17') prepared and served on the appellant. The exhibits were subsequently handed over to PW5, the investigating officer of this case. E

[15] A cautioned statement ('P38') was recorded from the appellant on the same day at about 3.45pm by PW6.

[16] P38 was received as part of the prosecution's evidence, after a trial within a trial to determine whether it had been made voluntarily by the appellant. F

[17] Upon analysis, the chemist, PW4, confirmed the said whitish powdery and lumpy substance to be cocaine with a nett weight of 508.6g. G

FINDINGS OF THE HIGH COURT

[18] At the close of the prosecution's case, the learned trial judge was satisfied that the prosecution had proved a prima facie case on the charge and the appellant was called upon to enter his defence. H

[19] In convicting the appellant at the close of the trial, the learned trial judge in his judgment appearing at pp 646–647 of the appeal record, had this to say: I

> Based on his own testimony in cross-examination, and his admission in his statement in P38, I find, as a fact, that the accused had at all material times full knowledge of the drugs in P7 and the nature of the drugs, in that they were prohibited drugs, even though he might not have knowledge as to the type of drugs

A in his possession, that is, whether it was cocaine or otherwise. In the circumstances, actual possession of the drug has been established beyond a reasonable doubt by the prosecution, without having to invoke the presumption under s 37(d) of the Dangerous Drugs Act 1952. The quantity of cocaine in the possession of the accused is large. It is more than 12 times the minimum prescribed under
B s 37(da)(ix) of the Dangerous Drugs Act 1952 for the presumption of trafficking in cocaine.

The presumption, under s 37(da)(ix) of anyone found in possession of 40g or more of cocaine to be trafficking in same, is a rebuttable presumption. The accused has not adduced any evidence to rebut the presumption, on a balance of probabilities.
C The accused did not testify that he was a drug addict. He did not testify that the cocaine was for his own consumption — on the contrary, he testified it was meant for 'Alahadjie' in Bangkok from whom he would be receiving US$3,000–US$4,000 upon delivery of the same. The accused has failed to rebut the presumption under s 37(da)(ix) Dangerous Drugs Act 1952. He had brought
D the drug, all the way from Amsterdam to Kuala Lumpur, in a hand carry luggage on a MAS flight, with custody, control and actual knowledge of the drug in P7.

[20] From the above passage, it is without doubt, that the learned trial
E judge had made an affirmative finding of possession independent of s 37(d) of the Dangerous Drugs Act 1952. Thereafter the learned trial judge had invoked the presumption under s 37(da)(ix) of the Act to come to a finding that the appellant was trafficking in the dangerous drugs that he was carrying on that day.

F

FINDINGS OF THE COURT OF APPEAL

[21] Although the appellant included 11 grounds of appeal in his petition
G of appeal, the Court of Appeal only heard three grounds.

[22] They are:

(a) admissibility of statement made under s 37A(1) of the Act;

H (b) possession; and

(c) the learned trial judge had prejudged the issue before hearing the submissions of learned counsel and the deputy public prosecutor ('DPP') at the end of the defence case.

I

[23] For the reasons they have given in their judgment, the Court of Appeal found that they were in entire agreement with the findings of the learned trial judge regarding the grounds of appeal raised. For those reasons they found there was no merit in the appeal and dismissed the same. The conviction and

sentence imposed by the learned trial judge were confirmed. A

THE APPEAL

[24] Before us learned counsel for the appellant raised the same grounds of appeal as raised before the Court of Appeal except the issue on possession. B

[25] The first ground is that the learned trial judge had prejudged the case before hearing the appellant's submission as the learned trial judge's decision was dated on the day the appellant entered his defence and not on the date the actual decision was delivered. C

[26] The second ground is related to the cautioned statement under s 37A(1) of the Act which according to appellant's counsel should not be admissible as the appellant did not understand the caution administered. D

FIRST GROUND

[27] Learned counsel for the appellant contended that the learned trial judge had prejudged the issue even before hearing submissions of learned counsel and the DPP. Counsel alleged that the grounds of judgment was written on 18 January 2005 as reflected at the foot of p 648 of the appeal record, Vol 2. E

F

[28] The date 18 January 2005 was the date the appellant entered his defence.

[29] After the appellant had entered his defence and been cross-examined by the DPP the learned trial judge fixed 26 January 2005 for submission by parties. G

[30] Looking at pp 140–145 of the appeal record, we observe that both counsel and DPP did make their submissions on 26 January 2005 and the learned trial judge handed down his decision immediately after that. H

[31] It is obvious to us and we agree with the decision of the Court of Appeal that the date 18 January 2005 is a typing error.

I

[32] Even assuming for a moment that it is not a typing error and the learned trial judge had actually completed his judgment on the 18th, we see no reason why he could not give his decision on the 18th but instead gave his decision on the 26th. So logically speaking it must be a typing error. In any

A case it is normal that a judge will write his judgment after he had handed down the decision ie in this case after 26 January 2005.

[33] The next question we ask is whether the learned trial judge is obliged to hear submissions from counsel and DPP before he gives his decision?

B

[34] In other words, is it mandatory for the learned trial judge to hear submissions before giving his decision?

C [35] In our judgment it is not mandatory for the learned trial judge to hear submission from learned counsel before giving his decision.

[36] Section 181(1) of the Criminal Procedure Code provides:

D

> When the accused is called upon to enter his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) *may sum up his case* ... (Emphasis added.)

E

[37] The word 'may' indicates a discretion. Therefore it could be seen that submission at the end of the defence case is discretionary and not mandatory. Therefore the learned trial judge could if he wanted to, decide without having the need to hear submission from defence counsel. Submission is not evidence and hence the judgment is not defective. If the law categorically states that it is not mandatory for counsel to make submission, we can see no reason why it is mandatory for the learned trial judge to hear submission. What, if learned counsel chooses not to make submission? Is the learned trial judge still obliged to call upon learned counsel to make submission? If indeed the law intends that the learned trial judge should hear submission than it would say so in no uncertain terms.

F

G

H [38] Having perused the notes of evidence of the learned trial judge we observed that the learned trial judge did consider the submission of learned counsel (see pp 140–144 of the appeal record, Vol 1). Thus, this fact lends credence to the date 18 January being a typographical error.

I [39] We therefore say that there is no basis for learned counsel for the appellant to allege that the learned trial judge has prejudged the matter even before submission is heard and that this has prejudiced the rights of the appellant.

[40] We find that this ground has no merits.

SECOND GROUND

[41] This ground deals with the admissibility of the statement under s 37A(1) of the Act ('P38').

[42] Learned counsel for the appellant contended that the appellant did not give the statement voluntarily and his rights and consequences of giving the statement were not explained to him in his mother tongue ie Tagalog, and the appellant did not understand the caution administered to him in English.

[43] Learned counsel further contended that P38 should not be admissible and that, without it, the learned trial judge is left with no other evidence to find that the appellant was in possession of the drugs and that the prosecution had made out a prima facie case.

[44] With respect to learned counsel, we find that his submission on this ground is totally flawed.

[45] We will now deal with the question pertaining to the language used. Chief Inspector Lee Chee Yong, the first witness in the trial within a trial (TWT PW1) told the court at p 75 of the appeal record, Vol 1, as follows:

> Saya berkomunikasi dengan suspek dalam bahasa Inggeris. Dia faham apa yang saya maksudkan. Beliau faham apa saya cakapkan. Saya ada tanya pada suspek sama ada beliau mahu seorang jurubahasa Filipina. Beliau kata tidak perlu kerana beliau fasih cakap Bahasa Inggeris.

(Translation):

> I communicated with the suspect in the English language. He understood what I meant. He understood what I said. I did ask the suspect whether he wanted a Filipino interpreter. *He said no need as he speaks fluent English*. (Emphasis added.)

[46] From the above it is obvious that the appellant has confirmed that he can understand and speak the English language fluently.

[47] The fact is further confirmed by ASP Maidu bin Abu Bakar who also gave evidence in the trial within a trial as prosecution witness No 2 (TWT PW2). His evidence appears at p 91 of the appeal record, Vol 1, as follows:

> Saya tidak tanya suspek sama ada beliau perlu jurubahasa Tagalog oleh kerana suspek dan saya bercakap dalam Bahasa Inggeris dan dia fasih Bahasa Inggeris.

(Translation):

> I did not ask the suspect if he needed a Tagalog interpreter *as we spoke in English and he is fluent in the English language*. (Emphasis added.)

[48] In the cautioned statement ('P38') appearing at p 677 of the appeal record, Vol 2, we observed that the appellant chose to speak in the English language when asked by the recording officer in which language he would like to speak.

[49] In the trial within a trial, when cross-examined, the appellant told the court that he spoke in 'broken English' when he was in Amsterdam. This suggests that the appellant can understand the English language.

[50] Accepting and admitting the cautioned statement the learned trial judge, in his judgment at p 638 of the appeal record, Vol 2 had this to say:

> The cautioned statement (P38) was received as part of the prosecution's evidence, after a trial within a trial to determine whether it had been made voluntarily by the accused. On the evidence before me, I was entirely satisfied the said statement was voluntarily made by the accused. I was entirely satisfied there was no inducement, threat or promise for making the statement. *I was also satisfied that the accused was indeed able to communicate with SP6 in English, and the absence of a Filipino interpreter did not render the statement of the accused inadmissible in law.* (Emphasis added.)

[51] This is certainly a strong finding of fact made by the learned trial judge. The purpose of having a trial within a trial is to determine if the alleged statement was made voluntarily with no possible inducement, threat or promise. We agree with the Court of Appeal that once a trial judge has come to a conclusion that the statement was made voluntarily, an appellate court should be slow in interfering with such finding unless it can be shown that such finding was flawed with a distinct material error of principle or the learned trial judge had clearly and wrongly evaluated the facts.

[52] Having regard to the general principles applicable to voir dire hearing and in the absence of a distinct and material error of principle we are reluctant to interfere with the finding of fact by the learned trial judge and confirmed by the Court of Appeal. It is therefore our considered view that the ruling on the admissibility of the cautioned statement (P38) by the learned trial judge was a correct one.

[53] It is said often enough that the finding of facts is a matter for the trial judge.

[54] In *Public Prosecutor v Munusamy* [1980] 2 MLJ 133, the Federal Court had occasion to deal with the issue of concurrent findings of fact and had this to say (at p 136):

> ... Where there have been concurrent findings of facts in the lower courts it should not be made a practice in the appeal court to review the concurrent findings of facts unless it is shown there was no evidence to support the inferences drawn in the lower courts (see also *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236).

[55] Indeed we find that there is no infirmity whatsoever in the concurrent findings of facts by the learned trial judge and the judges of the Court of Appeal which would require our appellate interference.

[56] We find that learned counsel's submission on this ground is also devoid of merits.

CONCLUSION

[57] For the reasons we had given earlier we are unanimous that this appeal failed. We would therefore affirm the order of conviction and sentence by the Court of Appeal.

[58] In the event the appellant's appeal against conviction and sentence is hereby dismissed.

Appellant's appeal against conviction and sentence dismissed.

Reported by Kanesh Sundrum